

At a(n) IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 14<sup>th</sup> day of August, 2015.

PRESENT:

HON. JOHNNY L. BAYNES,

JSC.

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In the Matter of the Application of	:	
	:	
DOWNSTATE AT LICH HOLDING COMPANY,	:	CORRECTED, AMENDED
INC.	:	AND RESTATED ORDER
	:	GRANTING 510/511 PETITION
For an Order Approving the Sale of the Assets of	:	
Downstate at LICH Holding Company, Inc.,	:	Index No. 505795/2015
pursuant to Sections 510 and 511 of the	:	
Not-for-Profit Corporation Law.	:	
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WHEREAS, Petitioner requests in its Verified Petition dated April 21, 2015 that the Court grant an Order approving the First Amended and Restated Purchase and Sale Agreement dated as of June 30, 2014 (“PSA”) by and among Downstate at LICH Holding Company, Inc. (“Petitioner” or “Seller”), FPG Cobble Hill Acquisitions, LLC (“FPG” or “Purchaser”), Fortis Property Group, LLC (“Fortis”), and NYU Hospitals Center (“NYUHC”) and thereby permitting the sale of substantially all of the assets of Petitioner (the “Transaction”), a not-for-profit corporation, pursuant to Sections 510 and 511 of the New York Not-for-Profit Corporation Law (“NPCL”); and

WHEREAS, Petitioner's real estate assets, including the four core hospital buildings known as the Fuller Pavilion, the Othmer Pavilion, the Henry Street Building, and the Polak Pavilion (collectively, the “Hospital”), as well as various non-core properties, are presently subject to a Lease Agreement dated May 29, 2011 (as amended through the date of this Order,

the “2011 Lease”) between Petitioner and The State University of New York (the “State University”), the sole member of Petitioner, and will be transferred pursuant to the trifurcated closing schedule set forth in the PSA (consisting of (1) the “Initial Closing”; (2) the “New Medical Site Closing” (also referred to in the PSA as the “NMS Closing”); and (3) the “Final Closing”); and

WHEREAS, a complete list of Petitioner's real property that is the subject of the Transaction (collectively, the “LICH Portfolio”) is set forth below, provided that the block and lot numbers and addresses of the Fuller Pavilion and the Othmer Pavilion will change as contemplated under the PSA upon completion of a tax lot subdivision by Purchaser; and

<b>TABLE A</b>		
<b>Building</b>	<b>Address</b>	<b>Block/Lot No.</b>
Fuller Pavilion	339-357 Hicks, 70-76 Atlantic	Block 284 part of Lot 1
Othmer Pavilion	91-95 Pacific	Block 284 part of Lot 1
Henry Street Building	97 Amity, 340 Henry	Block 290 part of Lot 13
Polak Pavilion	363 Hicks	Block 290 part of Lot 13
Polhemus Building	348-352 Henry	Block 295 Lot 21
349 Henry Building	349 Henry, 115 Amity	Block 291 Lot 1
Parking Garage	350-352 Hicks	Block 282 Lot 50
Engineer Building	385-389 Hicks	Block 295 Lot 3
Cobble Hill Condominium	124-134 Atlantic	Block 285 Lot 1001
94 Amity Residences	94 Amity	Block 295 Lot 14
86 Amity	86 Amity	Block 295 Lot 13
82 Amity Residence	82 Amity	Block 295 Lot 11
78 Amity	78 Amity	Block 295 Lot 9
76 Amity	76 Amity	Block 295 Lot 8
74 Amity	74 Amity, 379-383 Hicks	Block 295 Lot 7
113 Congress	113 Congress	Block 295 Lot 38
43 Columbia	43 Columbia	Block 259 Lot 8
336 Flatbush	336 Flatbush	Block 1058 Lot 30

184 Sterling	184 Sterling	Block 1058 Lot 28
112 Pacific Street	112 Pacific Street	Block 291 Lot 8

WHEREAS, Petitioner also shall convey to Purchaser all furniture, fixtures, equipment, machinery, materials, and other personal property of any kind or nature owned by Petitioner, excluding (a) certain personal property, of little or no value to Purchaser, that Petitioner and Purchaser agreed to exclude from the Transaction; (b) personal property stolen or otherwise removed from the real property without Petitioner's authorization; and (c) personal property that was consumed or became obsolete prior to October 31, 2014 (the non-real estate property being conveyed to Purchaser is hereafter the "Personal Property"); and

WHEREAS, the value of the Personal Property is immaterial relative to the value of the real estate assets being conveyed; and

WHEREAS, at the Initial Closing, the 2011 Lease will be deemed amended to remove therefrom the eastern portion of the Othmer Pavilion property, as well as the Parking Garage and all non-Hospital properties owned by Petitioner as indicated in Table B, below, and Petitioner will convey such properties and all the Personal Property wherever located, to Purchaser; and

WHEREAS, Purchaser will demolish the Fuller Pavilion building and the Othmer Pavilion building, and once demolition is complete and certain other conditions are met, the New Medical Site Closing will occur, at which time the 2011 Lease will be deemed amended to remove the New Medical Site therefrom, and Petitioner will convey the fully cleared New Medical Site (comprised of the Fuller Pavilion property and the western portion of the Othmer Pavilion property) to NYUHC, which will then commence construction, at its sole expense, of a "New Medical Building" on the New Medical Site; and

WHEREAS, the New Medical Building will be the permanent location for an emergency department, an ambulatory surgery center, certain cancer center services, and other medical services, in each case to be operated by NYUHC and/or other healthcare providers, and pursuant to the terms of the PSA, once the New Medical Building is complete, it may not be used for any purpose other than the delivery of health services and activities ancillary thereto for 20 years; and

WHEREAS, during construction of the New Medical Building, Petitioner will continue to own the Henry Street Building and the Polak Pavilion (collectively, the “Final Closing Premises”), but a portion of those premises will continue to be leased by Petitioner to Purchaser, and then subleased from the Purchaser to NYUHC, so that NYUHC can continue to operate an interim emergency department in such premises, and the balance of those remaining Hospital buildings will continue to be leased by Petitioner to the State University pursuant to the 2011 Lease until the New Medical Building is complete; and

WHEREAS, once the New Medical Building is complete, NYUHC will move its healthcare operations to the New Medical Building, the 2011 Lease and the leases relating to the interim emergency department will terminate, and the Final Closing will occur, at which time the Final Closing Premises will be conveyed to Purchaser; and

WHEREAS, upon and after the Final Closing, Purchaser (collectively along with any special purpose entities (“SPEs”) established by Purchaser, as described below) will own the entire LICH Portfolio other than the New Medical Site (where the New Medical Building will be constructed) which will be owned by NYUHC; and

WHEREAS, under the PSA, Purchaser may assign all or a portion of its rights to one or more SPEs formed for the purpose of acquiring title to the premises being conveyed to Purchaser

at any of the three closings, so long as the Kestenbaum family (the majority owners and principal officers of Purchaser) must also be the direct or indirect majority owners, and day-to-day operators, of each of these SPEs; and

WHEREAS, a complete list of entities to which title to the premises will be conveyed, including the SPEs formed by Purchaser, is set forth below, noting however that the Fuller Pavilion and the Othmer Pavilion will be demolished and the tax lot will be subdivided prior to conveyance; and

<b>TABLE B</b>			
<b>Current Building</b>	<b>Address</b>	<b>Closing</b>	<b>Purchaser SPE Name</b>
Fuller Pavilion	339-357 Hicks, 70-76 Atlantic	New Medical Site Closing	NYU Hospitals Center
Western portion of Othmer Pavilion property	91-95 Pacific, subject to change upon tax lot subdivision	New Medical Site Closing	NYU Hospitals Center
Eastern portion of Othmer Pavilion property	91-95 Pacific, subject to change upon tax lot subdivision	Initial Closing	FPG CH 91 Pacific, LLC
Henry Street Building	340 Henry	Final Closing	FPG CH 340 Henry, LLC
Polak Pavilion	363 Hicks	Final Closing	FPG CH 363 Hicks, LLC
Polhemus Building	348-352 Henry	Initial Closing	FPG CH 350 Henry, LLC
349 Henry	349 Henry, 115 Amity	Initial Closing	FPG CH 349 Henry, LLC
Parking Garage	350-352 Hicks	Initial Closing	FPG CH 350 Hicks, LLC
Engineer Building	385-389 Hicks	Initial Closing	FPG CH 385 Hicks, LLC
Cobble Hill Condominium	124-134 Atlantic	Initial Closing	FPG CH 124 Atlantic, LLC
94 Amity Residences	94 Amity	Initial Closing	FPG CH 94 Amity, LLC
86 Amity	86 Amity	Initial Closing	FPG CH 86 Amity, LLC
82 Amity Residence	82 Amity	Initial Closing	FPG CH 82 Amity, LLC
78 Amity	78 Amity	Initial Closing	FPG CH 78 Amity, LLC
76 Amity	76 Amity	Initial Closing	FPG CH 76 Amity, LLC
74 Amity	74 Amity	Initial Closing	FPG CH 74 Amity, LLC
113 Congress	113 Congress	Initial Closing	FPG CH 113 Congress, LLC

43 Columbia	43 Columbia Pl	Initial Closing	FPG CH 43 Columbia, LLC
336 Flatbush	336 Flatbush	Initial Closing	FPG CH 336 Flatbush, LLC
184 Sterling	184 Sterling	Initial Closing	FPG CH 184 Sterling, LLC
112 Pacific Street	112 Pacific Street	Initial Closing	FPG CH 112 Pacific, LLC

WHEREAS, the Initial Closing is scheduled to occur on or around August 31, 2015, if all required approvals are obtained and all conditions to closing are met or waived or not materially modified as permitted under the PSA and in no event inconsistent with the material terms of the PSA and the Transaction described in this Order<sup>1</sup>, by that date; the New Medical Site Closing is scheduled to occur no later than June 30, 2016, but the parties hope and expect that it will occur earlier; and the Final Closing is scheduled to occur no later than 36 months after the New Medical Site Closing, but in all cases, these deadlines are subject to possible extensions for unavoidable delays and under certain other circumstances as set forth in the PSA; and

WHEREAS, total cash consideration to be received by Petitioner for the assets of Petitioner is \$240,000,000; and

WHEREAS, a ten percent (10%) downpayment of \$24,000,000 was paid by Purchaser to Petitioner on June 30, 2014, and a second downpayment of \$2,000,000 is payable to Petitioner if Purchaser's lender requires certain minimal soil and other testing at the LICH site; and

WHEREAS, approximately \$120,000,000 (the "PIT Bond Defeasance Amount") of the \$240,000,000 in sale proceeds will be used to defease certain Personal Income Tax Bond debt ("PIT Bond Debt") associated with the LICH Portfolio; and

WHEREAS, at the Initial Closing, Purchaser will pay half of the total consideration for

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<sup>1</sup> The foregoing language is applicable to the first closing only and is not to be applied to any subsequent closing hereunder without the permission of the Court.

the LICH assets, or \$120,000,000, less all of the following (a) a portion of the downpayment; (b) the \$2,000,000 additional downpayment, if Purchaser has paid this additional downpayment prior to the Initial Closing; and (c) the PIT Bond Defeasance Amount, if Purchaser is required to and has paid the PIT Bond Defeasance Amount prior to the Initial Closing; and

WHEREAS, if the amount owed by Purchaser at the Initial Closing is a negative number, as is possible, the negative amount will be credited to the amount that Purchaser will otherwise pay at the Final Closing; and

WHEREAS, if more than one-half of the downpayment is applied to the purchase price at the Initial Closing, then within six months after the Initial Closing, Purchaser shall pay to Petitioner an additional downpayment of \$5,000,000; and

WHEREAS, at the Final Closing, a second payment of \$120,000,000 less the remaining downpayment will be made to Petitioner; and

WHEREAS, Petitioner will use the Transaction proceeds as set forth in that certain Grant and Distribution Agreement (“GDA”), effective as of June 30, 2014, by and between Petitioner and the State University, and specifically, on the closing date of the Initial Closing, Petitioner shall, (i) if not previously retired or defeased, retire or defease the PIT Bond Debt, (ii) pay that certain mortgage in the original principal amount of \$1,600,000 granted by Long Island College Hospital to AIP Associates and currently held by The Health Science Center at Brooklyn Foundation, Inc., pursuant to Assignment of Mortgage from U.S. Bank National Association encumbering the Cobble Hill Condominium (the “Condo Debt”), and (iii) if sufficient funds exist after the payment of the PIT Bond Debt and the Condo Debt, set aside a reasonable reserve (the “Reserve”), not to exceed \$2,000,000, for payment of payables, debts, and liabilities of Petitioner

including any that are not known or have not yet accrued as of the closing date of the Initial Closing, and on the closing date of the Final Closing, Petitioner shall (iv) pay all then-known outstanding debts and liabilities of Petitioner, including any debts and liabilities that are Petitioner's obligation then to pay under the PSA, and (v) set aside such funds as are necessary to fully fund the Reserve at a level of \$2,000,000, for payment of payables, debts, and liabilities of Petitioner that are not known or have not yet accrued as of the closing date of the Final Closing and to fund Petitioner's costs of wind-down and eventual dissolution; and

WHEREAS, (i) any remaining proceeds from the Transaction (after paying the PIT Bond Debt, the Condo Debt, all other debts and known liabilities, including paying for any required building upgrade in the interim medical space and any other obligation of Petitioner under the terms of the PSA, and setting aside the Reserve), which Petitioner and the State University estimate to be approximately \$110,000,000, and (ii) upon the eventual dissolution of Petitioner, any remaining portion of the Reserve, will be transferred by Petitioner to its sole member, the State University, in accordance with Petitioner's corporate purpose and the terms of the GDA; and

WHEREAS, the Stipulation and Proposed Order filed in the Supreme Court, Kings County on February 25, 2014 resolving the litigations under index numbers 13007/13 and 5814/13 is hereby incorporated by reference, including, without limitation, provision 4(a) stating in pertinent part that "Letitia James in her capacity as the Public Advocate of the City of New York . . . (collectively the "Releasers"), do hereby absolutely and irrevocably release, acquit, and forever discharge State University of New York . . . Downstate at LICH Holding Co. Inc . . . and each of [the State University's] respective administrators, officers, directors, trustees, employees, members, affiliates, attorneys, transferees, assigns, and successors (collectively the "Releasees"),



of and from any and all claims, actions, causes of action (under any theory of law, whether actionable in federal or state court), controversies, suits, debts, demands, rights, accounts, interests, guarantees, covenants, contracts, promises, trespasses, damages, injuries, judgments, losses, expenses, costs, attorneys' fees . . . that relates to or arises out of the purchase, sale assumption, operation or closure of LICH or any of its assets by [the State University] or any of its affiliates (collectively, the "Claims"), including, but not limited to, claims for, under, by reason of, challenging or relating to . . . (xiv) [the State University's] and/or Releasees' operation of LICH including, without limitation, with regard to its use and disbursement of funds and its conduct pursuant to [the State University's] and/or Releasees' purchase of LICH; and (xv) any and all matters concerning the Othmer fund or funds" and provision 4(d) stating in pertinent part that "[t]he Releasors shall not (i) take any legal action adverse to consummation of a transaction resulting in accordance with this Stipulation and Order; (ii) commence or prosecute any future legal proceeding, or related legal proceeding, to interfere with consummation of such transaction, including but not limited to Department approval of a closure plan in relation to LICH; or (iii) support, encourage, advise, or participate in any way with any third party in any legal proceeding adverse to the consummation or approval of such transaction by [the State University] . . . and the Community Releasors, as defined below, shall not participate any further as Intervenors in the In re: Long Island College Hospital action pending before Justice Carolyn Demarest;" and WHEREAS, as part of the transaction by which Petitioner acquired the LICH Portfolio in 2011 (the "2011 Transaction"), the seller in that transaction ("Old LICH") sought and received relief from the use restrictions on use of certain restricted funds from an endowment called the "Othmer Funds" and used all of such funds to establish a trust (the "Malpractice Trust") to discharge Old LICH medical malpractice claims and a separate account (the "LICH Liability

Fund”) to pay other Old LICH Liabilities and the State University through its Health Science Center at Brooklyn (“Downstate”) agreed that Downstate would replenish the Othmer Funds when and if able, with no accrued interest; and

WHEREAS, the proceeds of the Transaction will not be sufficient to permit Downstate to use any of the proceeds of the Transaction to replenish the Othmer Funds; and

WHEREAS Section 7.10(d) of that certain asset purchase agreement pursuant to which the 2011 Transaction was consummated (the “2011 APA”) gave the State University the right to receive (subject to Court approvals) any amounts remaining in the LICH Liability Fund after payment of the other Old LICH Liabilities; and

WHEREAS, Section 7.10(e) of the 2011 APA gave the State University the right to receive (subject to Court approvals) any amounts remaining in the Malpractice Trust after discharging all malpractice liabilities; and

WHEREAS, the State University hereby agrees to assign and direct any and all amounts to which the State University is entitled under Sections 7.10(d) and 7.10(e) of the 2011 APA to replenish the Othmer Funds in full discharge of the obligation of Downstate and the State University with respect to the Othmer Funds, and, together with the Health Science Center at Brooklyn Foundation (the “Foundation”) which entity was designated to receive and manage the Othmer Funds as part of the 2011 Transaction, shall seek cy pres and other relief as necessary to effectuate this assignment; and

WHEREAS, notwithstanding anything contained herein to the contrary, nothing shall affect, dissolve or relieve any party, their representatives, agents, successors or assigns, of their obligations, if any, with respect to any issue relating to the Othmer Endowment Funds; and

WHEREAS, Petitioner has presented three separate appraisals provided by third party

appraisers of the highest and best use of each parcel of the LICH assets; and

WHEREAS, the appraisals support the reasonableness of the consideration to be paid by Purchaser to Petitioner for the transferring assets; and

WHEREAS, Petitioner has shown that the proposed Transaction is fair and reasonable to Petitioner, and will promote Petitioner's charitable purposes in addition to the charitable, educational, and scientific mission and purposes of its sole member, the State University as required by section 511(a)(6) of the NPCL; and

WHEREAS, Petitioner having proceeded on notice to:

Entity/Individual	Address for Notice
Boerum Hill Association, Brooklyn Heights Association, Carroll Gardens Neighborhood Association, Cobble Hill Association, Riverside Tenants' Association, Wyckoff Gardens Association, Inc., and Kate Mackenzie	Gibson, Dunn & Crutcher 200 Park Avenue New York, NY 10166
Concerned Physicians of LICH, LLC	Toomas Mihkel Sorra, M.D., F.A.C.G. 554 Henry Street Brooklyn, NY 11231
Letitia James, Public Advocate for the City of New York	M. Umair Khan One Centre Street, 15th Floor New York, NY 10007
New York State Nurses Association and Carl Biers	Richard M. Seltzer Cohen, Weiss and Simon LLP 330 West 42nd Street New York, NY 10036
1199SEIU United Healthcare Workers East	Susan Cameron Levy Ratner, PC 80 Eighth Avenue New York, NY 10011
Attorney General of the State of New York Attn: Paula Gellman	Office of the New York State Attorney General Charities Bureau 120 Broadway New York, NY 10271-0332
Dormitory Authority of the State of New York Attn: Michael E. Cusack, Esq., General Counsel	515 Broadway Albany, NY 12207

NOW, upon Petitioner's showing that the consideration and the terms of the Transaction

are fair and reasonable to Petitioner and that the purposes of Petitioner and interests of the sole member, the State University, will be promoted,

NOW, upon a review of the information set forth in three separate appraisals of the highest and best use of each parcel of the LICH assets,

NOW, upon review of the Verified Petition dated April 21, 2015 and supporting documents, including the Affirmation of Ruth E. Booher dated April 9, 2015, the Affirmation of Kevin O'Mara dated April 1, 2015, the Affidavit of Richard Miller dated April 8, 2015, the Affidavit of Vicki Match Suna dated January 12, 2015, and the Affidavit of Joel Kestenbaum dated April 13, 2015, it is hereby

ORDERED, that the First Amended and Restated Purchase and Sale Agreement dated as of June 30, 2014 and the Transaction contemplated thereunder, including the sale of all or substantially all of Petitioner's assets, by Downstate at LICH Holding Company, Inc., a not-for-profit corporation, pursuant to the Not-for-Profit Corporation Law Sections 510 and 511 be and hereby are approved, subject to the insertion of the following provision immediately following Section 2(e) and renumbering of Section 2(e) to Section 2(e)(i) of the Declaration of Covenants and Restrictions (New Medical Site) attached to the PSA as Exhibit "T" upon execution and recording: "(ii) During the period commencing on the date upon which the Commencement of New Medical Operations occurs and expiring on the Declaration Expiration Date (that is, the day that is twenty (20) years after the commencement of New Medical Operations in the New Medical Building), the Declarant, and its successors and assigns, shall observe and comply with the obligation to operate in the New Medical Building an Emergency Department operating on a twenty-four (24) hours per day, seven (7) days per week, basis. For purposes of the preceding sentence, the term "Emergency Department" shall mean a freestanding

emergency department, licensed under Article 28 of the New York State Public Health Law, with all supportive services then required under said Article 28; **provided, however**, that a facility shall qualify as an Emergency Department only if such facility includes, without limitation, not less than four (4), and as many as twelve (12), observation beds, on an as-needed basis (and, if Declarant determines in its professional discretion, after the New Medical Operations commence, that additional observation beds are medically necessary, the Declarant, or its then successor or assign, shall ensure that the observation bed capacity is expanded to up to twenty (20) observation beds upon the receipt of New York State Department of Health and all other appropriate regulatory approvals), as the foregoing requirement to operate an Emergency Department in the New Medical Building may be suspended, from time to time, pursuant to the applicable provisions of the NMS Deed (including Sections 2(d) and 9), and including pursuant to a determination or direction of the New York State Department of Health.” ; and it is further

ORDERED, that the conveyance of Petitioner's real estate property to the special purpose entities created by Purchaser FPG Cobble Hill Acquisitions, LLC to take title to the real property in accordance with the PSA, at the closings indicated in Table B, above be and hereby is approved; and it is further

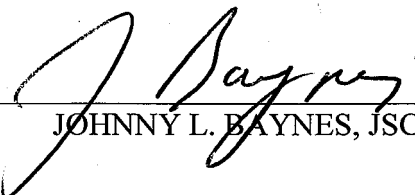
ORDERED, that, upon the completion of demolition and certain other conditions set forth in the PSA, the conveyance of the New Medical Site by Petitioner to NYUHC be and hereby is approved; and it is further

ORDERED, that the proceeds of the sale, after making the defeasance payment on the PIT Bonds Debt, paying the Condo Debt, paying all debts and known liabilities of Petitioner, paying for any required building upgrade in the interim medical space and any other obligation of Petitioner under the terms of the PSA, and setting aside the Reserve, shall be transferred by

Petitioner to its sole member, the State University, in accordance with Petitioner's corporate purpose and the terms of the Grant and Distribution Agreement effective as of June 30, 2014 and upon the eventual dissolution of the Petitioner, any remaining portion of the Reserve after paying all debts and liabilities of Petitioner, shall be transferred by Petitioner to its sole member, the State University, in accordance with Petitioner's corporate purpose; and it is further

ORDERED, that Petitioner shall serve a copy of the signed Order on the Attorney General of the State of New York, and that this Court and the Attorney General shall receive written notice (i) of the completion of each of the Initial Closing, the New Medical Site Closing and the Final Closing, (ii) if the Transaction has been abandoned, or (iii) if the Initial Closing and the balance of the Transaction are still pending 90 days after the Court's approval.

**ENTER**

  
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JOHNNY L. BAYNES, JSC